

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: General Government Appropriations Committee

BILL: CS/SB 2082

INTRODUCER: General Government Appropriations Committee and Senator Bennett

SUBJECT: Wetlands/Permitting

DATE: April 25, 2007

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Kiger	EP	<b>Fav/1 amendment</b>
2.		Wilson	GO	<b>Withdrawn</b>
3.	Kynoch	DeLoach	GA	<b>Fav/CS</b>
4.				
5.				
6.				

**I. Summary:**

The bill allows a dry slip storage facility which has been issued a development order prior to July 1, 1995, to be built with certain restrictions. Allows a phosphate mining operation in north Florida to complete its reclamation activities under its life-of-the-mine permit. Provides legislative intent relating to the coordination and implementation of regulatory duties and functions among various state and federal agencies for wetlands regulation and delineation. Authorizes the Department of Environmental Protection (department) to obtain an expanded state programmatic general permit, or a series of regional permits from the U.S. Army Corps of Engineers (Corps) for certain activities. Ratifies the changes that were approved by the Environmental Regulation Commission to the plant list used to delineate wetlands to reclassify slash pine and gallberry if certain conditions are met. Provides that wetland delineation determinations made prior to the effective date of this bill are not subject to the provisions of this bill for the term of the permit. Changes to the wetland delineation methodology do not apply to certain specified evaluations. The bill requires the department to provide notice when an applicant is denied a permit.

There is no significant fiscal impact to the department.

This bill amends sections 373.4132, 373.414, 373.4141, 373.4144, 161.041, and 403.087, Florida Statutes.

This bill creates section 373.4212, Florida Statutes.

## II. Present Situation:

Section 373.4132, F.S., provides that the water management district of the department shall require a permit for the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for ten or more vessels that is functionally associated with a boat launching area. As part of an applicant's demonstration that the facility will not be harmful to the water resources and will not be inconsistent with the overall objectives of the water management district or the department, the district or the department shall require the applicant to provide reasonable assurance that the secondary impacts from the facility will not cause adverse impacts to the functions of wetlands and surface waters and will meet the public interest test of s. 373.414(1)(a), F.S.

Section 373.414(15), F.S., provides that phosphate mining land reclamation activities and fullers earth mining land reclamation activities included in a conceptual reclamation plan or modification application submitted prior to July 1, 1996, continue to be reviewed under the rules of the department pursuant to ss. 403.91-403.929, F.S., 1984 Supplement,<sup>1</sup> as amended, rules of the water management district and interagency agreements in effect on January 1, 1993. These activities are exempt from the statewide methodology for delineating wetlands. As of January 1, 1994, these mining activities may be issued permits authorizing construction for the life of the mine.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) regulates work in, over, and under waters listed as "Navigable Waters of the United States." Navigable waters of the United States are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce.<sup>2</sup> These are waters that are navigable in the traditional sense where permits are required for certain activities pursuant to Section 10 of the Rivers and Harbors Act. Some typical examples of projects requiring Section 10 permits include beach nourishment, boat ramps, breakwaters, dredging, filling or discharging material, groins and jetties, mooring buoys, piers, placement of rock riprap for wave protection or stream bank stabilization, boat hoists pilings, and construction of marina facilities. Permits for these activities are issued by the U.S. Army Corps of Engineers.

Section 404 of the federal Clean Water Act established a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities.)<sup>3</sup>

Proposed activities are regulated through a permit process. An individual permit is required for potentially significant impacts and are reviewed by the U.S. Army Corps of Engineers. For discharges that will have only minimal adverse effects, a general permit may be issued. General

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<sup>1</sup> ss. 403.91-403.929, F.S., is the Henderson Wetlands Act that was repealed by ch. 93-213, L.O.F.

<sup>2</sup> <http://www.usace.army.mil/cw/cecwo/reg/33cfr329.htm#329.3>

<sup>3</sup> [http://www.epa.gov/owow/wetlands/pdf/reg\\_authority\\_pr.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf)

permits are issued on a nationwide, regional, or state basis for particular categories of activities. Under this program, the U.S. Army Corps of Engineers administers the day-to-day program; conducts or verifies jurisdictional determinations; and enforces Section 404 provisions. The Environmental Protection Agency develops and interprets policy, guidance and environmental criteria used in evaluating permit application; determines scope of geographic jurisdiction and applicability of exemptions; approves and oversees state and tribal assumption; and enforces Section 404 provisions.<sup>4</sup>

The Department of Environmental Protection regulates dredging and filling activities in wetlands and other surface waters in order to protect the environment. The water management districts and the local governments also have a role in the delineation and protection of wetlands.

Section 373.421, F.S., directed the Environmental Regulation Commission (ERC) to adopt a unified statewide methodology for the delineation of the extent of wetlands. This methodology did not become effective until ratified by the Legislature in 1994. The wetland delineation rule is found in ch. 62-340, F.A.C.

For most projects, the use of the federal delineation method and the state delineation method result in similar wetland boundaries. However, the plant lists used by the federal government and the state government differ as indicators of wetland boundaries. For example, the federal plant list shows slash pine and gallberry as wetland indicators while the state list shows these plants as upland indicators. There is some consensus in the biological community that these plants should be listed as facultative, or neutral indicators. On February 23, 2006, the ERC approved amendments to the wetland plant list to change slash pine and gallberry from an “upland” status to a “facultative” status. The rule change reduces the current differences that exist between the state and federal wetland methodologies—a step toward streamlining the state and federal programs. In order for this change to become effective, the Legislature must ratify the change.

Section 373.4143, F.S., directed the department to develop a strategy for consolidating or streamlining the state and federal programs to the extent possible. The department developed the strategy, identified the problems, and made a number of recommendations which were submitted in a formal report to the Legislature and the Governor.

### III. Effect of Proposed Changes:

**Section 1** amends s. 373.4132, F.S., to provide that if a development order for a development of regional impact issued under ch. 380, F.S., was issued before July 1, 1995, authorizing a dry slip storage that has yet to be constructed is entitled to the number of dry slips approved under that development order subject to the condition that no more than 15 percent of the watercraft from the dry slip storage may access the water each day.

**Section 2** amends s. 373.414(15), F.S., to provide that lands added to a conceptual reclamation plan, subject to this section through a modification submitted after July 1, 1996, which are contiguous to the conceptual reclamation plan area are exempt from certain department and water management district rules if the total acreage of the conceptual reclamation plan is not

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<sup>4</sup> Id.

increased through the modification and the cumulative acreage added does not exceed 3 percent of the conceptual reclamation plan area. Lands that have been mined or disturbed by mining activities, lands subject to a conservation easement under which the grantee is a state or federal regulatory agency, and lands otherwise preserved as a part of a permitting review may not be removed from the conceptual reclamation plan under this subsection.

**Section 3** amends s. 373.4144, F.S., to provide that it is the intent of the Legislature to:

- Facilitate coordination and a more efficient process of implementing regulatory duties and functions among the department, the water management districts, the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Environmental Protection Agency, the Florida Fish and Wildlife Conservation Commission, and other relevant federal and state agencies.
- Authorize the department to obtain issuance by the Corps of an expanded state programmatic general permit, or a series of regional permits for certain activities.
- Use the mechanism of a general permit or permits to eliminate overlapping federal regulations and state rules that seek to protect the same resource and to avoid duplication of permitting between the Corps and the department for minor work located in waters of the United States, including navigable waters, so as to eliminate an inappropriate need for a separate, individual approval from the Corps while ensuring maximum protection of wetland resources.
- Prohibit the department from seeking issuance of or taking any action under such permit or permits unless the conditions of the permit or permits would protect the environment and natural resources at least as much as the provisions of part IV of ch. 373, F.S., the federal Clean Water Act, and the federal Rivers and Harbors Act.
- Add slash pine and gallberry, as facultative species, to the list of plants that this state uses to delineate jurisdictional wetland communities an incentive for, and contingent upon, aligning the method by which the federal government and Florida delineate jurisdictional wetland communities so that federal and state methods delineate the same communities and an impediment to the authorization of a state programmatic general permit by the Corps is removed.

In order to avoid duplication and effectuate efficient permitting of activities that affect wetlands, the department and the water management districts shall, subject to agreement by the Corps, implement a statewide programmatic general permit for all dredge and fill activities affecting 5 acres or less of wetlands or other surface waters, including navigable waters. The permit must be voluntary and is subject to certain specified conditions.

The department is not precluded from pursuing a series of regional general permits for construction activities in wetlands and surface waters or complete assumption of certain federal permitting programs.

**Section 4** creates s. 373.4212, F.S., to ratify the change to rule 62-340.450(3), F.A.C., approved on February 23, 2006, by the Environmental Regulation Commission which adds *Pinus elliottii* (slash pine) and *Ilex glabra* (gallberry) to the list of facultative plants. This ratification and the rule revision may not take effect until state and federal wetland jurisdictional delineation methodologies are aligned.

Certain surface water and wetland delineations approved in a permit issued before the effective date of this act, remain effective until the expiration of the permit. For surface water and wetland delineations not identified and approved in a permit issued under part IV of ch. 373, F.S., delineations within the geographical area to which the permit applies shall be determined pursuant to the rules applicable at the time the permit was issued. This section also applies to any modification of the permit issued under rules adopted under this part which do not constitute a substantial modification within the geographical area to which the permit applies.

Any declaratory statement issued by the department under s. 403.914, F.S., 1984, Supplement, or by the department or a water management district under s. 373.421, F.S., in response to a petition filed on or before the effective date of this act shall continue to be valid for the duration of the declaratory statement. Any petitions pending on or before the effective date of this act are exempt from the change to rule 62-340.450(3), F.A.C., and shall be subject to the provisions of ch. 63-340, F.A.C., in effect prior to that change.

A permit application under this part for dredging and filling or other activity that is pending on or before the effective date of this act is exempt from the change to rule 62-340.450(3), F.A.C.

Certain mining activities are exempt from the change to rule 62-340.450(31), F.A.C.

**Sections 5, 6, and 7** amend ss. 161.041, 373.4141, and 403.087, F.S., to provide that when the department denies an application for a permit, the department shall provide written notice to the applicant. The notice must include legal authority for the denial of the permit and a citation to the applicable portions of an ordinance, rule, or statute.

**Section 8** provides that the Division of Statutory Revision is directed to substitute the date on which this act takes effect for the phrase “the effective date of this act” wherever it occurs when preparing for publication in the next edition of the Florida Statutes.

**Section 9** provides that this bill will become effective upon becoming a law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The mining provisions will allow a phosphate mine in northern Florida to complete its reclamation efforts under its life-of-the-mine permit.

This bill will allow a marina dry slip facility in southwest Florida to proceed with its construction plan authorized before July 1995, with the restriction that no more than 15 percent of the watercraft from the dry slip storage may access the water each day.

To the extent that a unified methodology for delineating wetlands exists that is substantially the same for the state and federal waters, there could be a reduction of costs and permitting time because the duplication of efforts has been either reduced or eliminated.

**C. Government Sector Impact:**

No significant impact.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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